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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-5541

DENNIS L. LIEPMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL,

SECOND APPELLATE DISTRICT,

STATE OF CALIFORNIA

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IN THE

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I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
STATE OF CALIFORNIA

Petitioner, Dennis L. Liepman, respectfully prays for a Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California, to review its judgment affirming Petitioner's conviction.

OPINION BELOW

Trial in the Los Angeles Superior Court was by the Court sitting without a jury.

The Second District Court of Appeal affirmed the judgment on July 15, 1971. The opinion rendered therein is appended hereto as Appendix "A" (said opinion was certified for non-publication).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioner sought relief by way of appeal to the District Court of Appeal, as prescribed under California law. That court affirmed the trial court's judgment. Thereafter, a Petition for Hearing was directed to the California Supreme Court, this State's highest tribunal qualified to hear the issues, and that petition was

denied on September 8, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED FOR REVIEW

I

Does a police officer's obersation, made possible only by weeding through objects on a platform connected to a business storage garage, bending down to three feet above the platform, and using a flashlight to observe the interior of the premises through a tiny and almost inaccessible aperture, violate Petitioner's reasonable expectation of privacy as guaranteed by the Fourth, Fifth and Ninth Amendments to the United States Constitution, as made applicable to the States by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved are the United States Constitution, Amendments Four, Five, Nine and Fourteen.

STATEMENT OF THE CASE

Petitioner was charged by information in the Los Angeles Superior Court with violating Section 11911 of the Health & Safety Code in Count I, 11910 of the Health & Safety Code in Count II, 11530 of the Health & Safety Code in Count III, 11500 of the Health & Safety Code in Count IV, and 12353 of the Health & Safety Code in Count V. All of these violations were alleged to have occurred on July 30, 1969 [C.T. 1-5.]

On November 18, 1969, Petitioner was arraigned, pled not guilty on all counts and noticed a Motion under Penal Code 1538.5 for December 11, 1969 [C.T. 6].

On December 11th, the hearing began and concluded with a denial of the Motion. Trial was then set for January 11, 1970, at 9:30 A.M. in Department "A" [C.T. 7].

After a subsequent continuance [C.T. 8], the case went to trial on February 11, 1970, before Judge Walter Evans of the Los Angeles Superior Court [C.T. 9]. On motion of the defendant, Count V was dismissed. Defendant was convicted on Counts I, II and III, and found not guilty on Count IV. A Probation and Sentence Hearing was set for March 13, 1970 [C.T. 10]. On that date, proceedings were suspended and probation granted for three years upon condition that Liepman spend the first eight months in the County Jail. Proceedings were likewise suspended on all other counts with the sentences to run concurrently [C.T. 11].

On March 13, 1970, a Notice of Appeal was properly and timely filed [C.T. 12].

The sole and jugular issue on appeal relates to the question of Search and Seizure, which was litigated under Penal

Code §1538.5.

On July 15, 1971, the Second District Court of Appeal decided that the search was legal by a margin of two to one (Presiding Justice Otto M. Kaus, dissenting).

A Petition for Hearing was denied by the California Supreme Court on September 8, 1971.

The case is now properly before this Court.

STATEMENT OF THE FACTS

The following evidence was adduced at the hearing on Petitioner's motion under Penal Code Section 1538.5:

According to the testimony of Fred J. McKnight, a Los Angeles Police Department Officer, he and his partner, Officer George Robison, perhaps accompanied by a Lieutenant Brown, went to part of Petitioner's business premises at 2455 Lee Avenue, South El Monte, at approximately nine o'clock on the evening of July 29, 1970 [R.T.,pp.3-4]. Officer McKnight indicated that he could only estimate that he had been at these premises five or six times previously [R.T., p.6, lines 22-24] and at trial testified that he had only seen the Petitioner at said location "no more than twice". [R.T., p.77, lines 5-6.]

The Petitioner's business property, the Pro-Clean Chemical Company [R.T., p.8, lines 9-11], is situated adjacent to a detached garage, the latter being used by the Petitioner for storage of materials used in his business [R.T., p.49, lines 18-21] as a maintenance contractor [R.T., p.105, lines 13-23]. The property is surrounded by a chain link fence which, according to Officer McKnight, had previously been locked but which on the aforementioned date he "believes" was unlocked [R.T., p.6, lines 8-17]. Enclosed within this fence is the garage with a platform extending off the rear outside wall [R.T., p.9, lines 21-26]. On the platform there was a refrigerator, a stove, and according to the testimony of Officer McKnight, literally hundreds

of containers [p. 11, lines 3-4] used for storing chemicals in Petitioner's business [R.T., p.25, lines 3-13].

On July 29, 1970, the Petitioner's garage was locked, there was either one window which had been completely boarded over or more probably there were no windows at all, and there were no lights on inside the garage. In any event, the officers were not able to observe the interior of the garage through any door or window [R.T., p.11, line 16, to p.12, line 4; p.14, lines 2-7]. The only opening into the garage was a small hole [R.T.,p.17, lines. 2-9], drilled by the Petitioner for business purposes, through which he had installed an exhaust pipe such that the latter protruded outside of the garage [R.T.,p.13, lines 13-19; p.20, lines 11-17]. According

to the testimony of Petitioner's mother, it was difficult, if not impossible, to see the exhaust pipe because of the hundreds of containers stored on the platform [R.T., p.27, lines 6-12; p.29, lines 10-16]. Although Officer McKnight testified that he had an unobstructed view of the exhaust pipe and did not have to move any containers to gain access to that area [R.T., p.11, lines 13-15; p.14, lines 19-22], this testimony is belied by his subsequent testimony that nothing was moved "in my presence" and by the testimony of his partner, Officer Robison, that "I remember stepping around, kind of weeding my way through the objects that were on the platform" [R.T., p.14, lines 23-26; p.31, lines 22-23].

Regardless of the manner by which the officers gained access to the area from which the exhaust pipe protruded, Officer

McKnight had to bend down in order to be able to look through that portion of the hole surrounding the exhaust pipe because it was only three feet above the platform [R.T., p.14, lines 14-18]. As Officer McKnight looked through the drilled hole, Officer Robison shined his flashlight in his direction so that it illuminated the interior of the garage [R.T., p.14, lines 5-11]. This enabled Officer McKnight to observe what appeared to be a machine for making dangerous drugs [R.T., p.17, lines 10-15].

On the basis of the observations of Officer McKnight hereinabove set forth, search warrants were issued for the Petitioner's business premises at 2455 Lee Avenue, South El Monte, and his personal residence at 9816 Kiaora Place, Arcadia [R.T., p.7, lines 10-15].

On July 30, 1970, the search warrants were executed and the officers found assorted contraband and the Petitioner was arrested for violations of Sections 11911, 11910, 11530, 11500, and 12353 of the Health and Safety Code.

At the conclusion of the hearing on Petitioner's motion under Penal Code Section 1538.5 to suppress all evidence seized on July 30, 1970, the court denied the motion [R.T., p.36, lines 11-18]. The Court based its ruling on its conclusion that neither officer enlarged the hole and that, therefore, although there was a trespass by the officers, they were entitled to observe the interior of Petitioner's garage.

At trial, defense counsel again objected to the introduction into evidence of the items seized on July 30, 1970, but said motion was denied [R.T., p.102, lines 21, to p.103, line 25].

Both the 1538.5 motion and the motion made at trial were based on Petitioner's Fourth Amendment rights, as made applicable to the States by the Fourteenth Amendment to the United States Constitution.

Petitioner was convicted of violations of Sections 11911, 11910, and 11530 of the Health and Safety Code, found not guilty of violation of Section 11500, and, on the motion of the defendant, the allegation of violating Section 12353 was dismissed [R.T., p.146, lines 8-11].

I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND ALMOST INACCESSIBLE APERTURE, VIOLATED PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

In Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507 (1967), this Court reversing petitioner's conviction on the basis of electronic surveillance in the absence of antecedent judicial approval, held that "the Fourth Amendment protects people, not places":

In Terry v. Ohio, 392 U.S. 1,9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), this Court, in an oft-quoted statement, held that

> "wherever an individual may harbor a reasonable 'expectation of privacy' he is entitled to be free from unreasonable governmental intrusion."

Admittedly, as this Court stated in Katz v. United States, 389 U.S. 347, 351-352, that which

> "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (Citations omitted). But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected."

It is unfortunate that many lower state courts have neglected to preserve the vitality of the statements in Katz and Terry. Moreover, it appears, as in Petitioner's case, that the lower courts have equated the ability and willingness of law enforcement officers to find and utilize tiny and almost inaccessible apertures into a person's domicile or business premises with a willingness on the part of that person to abandon any expectation of privacy. In addition, it is said by these courts that if law enforcement officers are able to view the interior of a person's domicile by weeding through objects on a platform which obstruct their view of a tiny and inaccessible aperture and by then employing a flashlight to view the interior of those premises, the objects seen within are in plain view. It is

Petitioner's belief that to uphold this view is to require that citizens turn their homes and business premises into fortresses to insure their own privacy. A man's home would then cease to be his "castle", but would become his dungeon.

The lower court held in the case at bar that Petitioner had exhibited no reasonable expectation of privacy for four reasons: First, employees of Petitioner might have reason to go into the area of the platform in question and, assuming they too "weeded through" the objects on the platform (as pointed out by Presiding Justice Kaus in dissent), bending down to the aperture, be able to view the interior of the garage. Second, although Petitioner had placed a padlock on the front doors of the garage, the Court felt that this was to insure the prevention of theft and not to prevent the viewing of the interior of the garage.

But as pointed out by the Court, Petitioner had hung a curtain inside, separating the rear portion (that into which the officers had looked) from the front portion. [Appendix "A", pp.4,n.3,11.] Third, the Court reasoned that a hole in the wall was equivalent to leaving an opening in window curtains, noting that an opening indicates the non-existence of a strong desire for privacy. [Appendix "A", pp.11-12.] The majority did not believe it significant that the officers had to stoop and use a flashlight to view the interior. [Appendix "A", p.14.] Cf. Brock v. United States, 223 F.2d 681 (5th Cir.1955) (police officers' trespass onto defendant's property and looking into a bedroom window violative of Fourth Amendment); California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (police officers' trespass

into defendant's backyard, seeing and opening paper bag placed under back porch, violative of Fourth Amendment). Fourth, and without explanation, that the police officers had a right to be on Petitioner's platform, having had to pass through two chain link fences (padlocked but not locked at the time) on Petitioner's property. [Appendix "A", p.16.] Presiding Justice Kaus, in dissent, believed that Petitioner had "manifested an objectively reasonable expectation of privacy", reasoning as follows:

> "Although the pipe was visible from the rear of the platform, there is no suggestion in the record that the pill machine could have been observed from that location, even with the use of a flashlight. Robison testified that

he was able to approach the wall where the pipe protruded by 'kind of weeding' his way through the objects on the platform." [Appendix "A", p.18.]

That Petitioner's premises are part of his business does not mean the abandonment of his Fourth Amendment rights. It has long been settled that commercial premises enjoy Fourth Amendment protection from unreasonable searches and seizures. See v. Seattle, 387 U.S. 541,543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1968); Mancusi v. DeForte, 392 U.S. 364,367, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Hoffa v. United States, 385 U.S. 293,301, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); Go-Bart Importing Co. v. United States, 282 U.S. 344,357, 51 S.Ct. 153, 75 L.Ed. 374 (1931); Gouled v. United States,

255 U.S. 298,305,309, 41 S.Ct. 261 (1921). Moreover, it is submitted that if a defendant is entitled to a reasonable expectation of privacy while telephoning from a public phone, that same protection should be afforded for those in their domiciles or business premises. For, as this Court held in Katz, that which a person

> "seeks to preserve as private even in an area accessible to the public, may be constitutionally protected."
> [389 U.S. 347,351-352.]

If the courts can circumvent the Katz decision by legitimizing police conduct that allows officers to place objects in "plain view" by that conduct, then citizens will have to turn their homes and businesses into fortresses in order to convince those

courts of a manifestation of a reasonable expectation of privacy. This is clearly not the intent of this Court in Katz. But, absent more stringent restrictions on the manner by which officers may assert that objects are in their plain view, it is submitted that this is the inevitable result.

Moreover, the decision of the lower court can only result in allowing law enforcement officers to employ suspect methods to place themselves in positions to view the interiors of citizens' homes and businesses in violation of the holding in Harris v. United States, 390 U.S. 234,236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). There, this Court held that

> "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

To legitimize a police officer's weeding through objects to find a minute and inaccessible aperture through which, by the use of a flashlight, he may view the interior of Petitioner's premises nullifies the decision in Harris. Cf. Brock v. United States, 223 F.2d 681,685 (5th Cir. 1955), where the court held as follows:

> "To begin with, the agents, when they appeared outside Brock's bedroom window, were in violation of his rights under the Fourth Amendment. Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

Accord, People v. Regalado, 193 Cal.App.2d

437 (1961), remanded in light of Ker v. California and McDonald v. United States, 374 U.S. 497, 83 S.Ct. 1875, 10 L.Ed.2d 1044 (1963), and reversed 224 Cal.App.2d 586 (1964) (officer illegally looked through tiny aperture drilled in door of hotel room). People v. Edwards, 71 Cal.2d 1096 (1969); Britt v. Superior Court, 58 Cal.2d 469, 471-472 (1962).

Finally, to uphold the decision of the lower court may mean that courts will continue to equate "plain view" not with what one has in fact knowingly exposed to public view but rather with what law enforcement officers have been able to ferret out and expose to their own view by subtle but no less serious invasions of the privacy of the individual, his domicile and his business. As this Court noted in Johnson v. United

States, 333 U.S. 10,14, 68 S.Ct. 367 (1948):

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."

Should the decision of the lower court not be reviewed, but allowed to stand, we have perhaps not heeded the warning of this Court in Gouled v. United States, 255 U.S. 298,302-303, 41 S.Ct. 261, 65 L.Ed. 647 (1921):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court

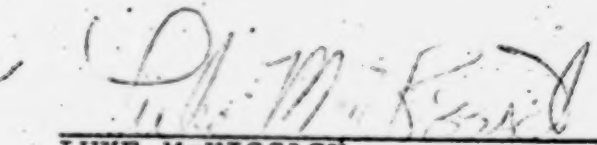
(Citations omitted) have declared the importance to political liberty and to the welfare of our country of the due observation of the rights guaranteed under the Constitution by [the Fourth and Fifth] Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen. . . .It has been repeatedly decided that these amendments should

receive liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

CONCLUSION

The Petition for Writ of Certiorari, Petitioner respectfully prays, should be granted and the judgment reversed.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On October 19, 1971, I served the within PETITION FOR WRIT OF CERTIORARI on the Plaintiff and Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General, State of California
217 West First Street
Los Angeles, California 90012

District Attorney, Los Angeles County
Hall of Justice, Room 600
211 West Temple Street
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Los Angeles Superior Court
Clerk's Office, Criminal Records
Hall of Justice, Room 448
211 West Temple Street
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on October 19, 1971, at Los Angeles, California.

Louise A. Monaco

LOUISE A. MONACO

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DENNIS L. LIEPMAN, Defendant and Appellant.	2d CRIM. NO. 18315 Sup. Ct. No. A-505

APPEAL from a judgment of conviction of the Superior Court of Los Angeles County. Walter R. Evans, Judge. Affirmed.

Luke McKissack for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and John R. Evans, Deputy Attorney General, for Plaintiff and Respondent.

EXHIBIT "A"

The sole issue on this appeal is the validity of a warrantless search, conducted about 9 p.m. on July 29, 1969, of a small, detached, commercial storage building (converted garage), the account of which formed the major and essential portion of an affidavit which, in toto, supported the issuance of a search warrant by a magistrate. A valid execution of the warrant at defendant's place of business and residence produced contraband, equipment, identification material and admissions which amply supported defendant's conviction of one count of Health and Safety Code [1] section 11911 (possession of benzedrine for sale), one count of section 11910 (possession of seconal and one count of section 11530 (possession of marijuana).

The initial warrantless search was attacked by defendant in a Penal Code section 1538.5 hearing (described by counsel as a traverse of the warrant) which resulted in the denial of the initiating motion and by objections at trial which were overruled.

We have determined that the questioned search was reasonable and, therefore, that the warrant proceedings

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[1] All section references are to Health and Safety Code.

were valid and the conviction supported. We proceed with our analysis.

Defendant was the owner and operator of a janitorial cleaning service, the business site of which was on Lee Street in a commercial section in South El Monte which once apparently had been a small-home residential area. On one side of defendant's premises was another commercial enterprise; on the other, a residence. The business used several trucks, considerable cleaning equipment and supplies, and eight employees. Defendant ordinarily attended to his business during the day and evenings. Apparently, in accordance with typical commercial janitorial service, much of the work was done during off hours of regular businesses. The appearance of defendant's business premises was testified to by witnesses and depicted in certain polaroid photographs. The lot itself was encompassed by a chain link fence. An additional fence ran across the width of the lot about 40 feet from the street and in front of what served as the business office, a small frame building, which, as seen in the photograph, looks about the size of a double garage. Originally

t may have been some type of auxiliary residential buildin here were gates on each fence through both of which one ntered to reach the office. They were equipped with adlocks which were not secured on the evening of the earch in question. Partly back to the rear of the lot as a detached frame garage (about one and one-half car apacity) converted to a storage room.[2] Two-thirds of he front of the garage was made up of double doors which pened in the middle. They were padlocked at the time of he search. The appearance of the garage in one of the hotographs suggests that with the doors closed there ould have been both vertical and horizontal cracks hrough which light would pass to the interior, but there s no testimony as to how much visibility there would have een for one looking through the crack.[3] There was no

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/ There was a third small frame building on the ot, the use of which was not explained.

/ Actually, a peek through one of the cracks by he officer here involved would have been unavailing be- ause there was a black curtain hung inside separating he rear portion of the garage from the front. However he reasonableness of the police action is properly judged rom outward appearances, although any subjective feelings f defendant militating against the concept of privacy robably are cognizable.

window which could be seen through. At the rear of the garage there was an extension of the two-thirds portion opposite the doors. Behind the one-third of the garage which was not extended was a platform with its length abutting the extension and its breadth abutting the rear of the garage itself. The photograph of this section shows a shed roof extending over the platform and some shelving stacked along the outer extremity of the platform opposite the wall of the extension, making a sort of alcove. However, the evidence suggests that this stack of shelving and shed roof were not present on July 29, but rather that the platform was open from above and on two sides. 4/ There is no designation on the pictures themselves as to when they were taken. However, there is an indication that they were taken on December 4, 1969, when another photograph, which did not

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4/ Defendant claimed that on July 30th the area looked as depicted in the photograph. He made several other claims at variance with other convincing evidence. There is no difficulty in assuming, as we should, of course, that the trial judge disbelieved defendant. Findings of fact of the trial court will not be disturbed on appeal if supported by substantial evidence. (People v. Superior Court, 3 Cal.App.3d 476, 488; People v. Lee, 3 Cal.App.3d 514, 525.)

ome into evidence, was snapped. Clearly the one in
uestion was taken after the exhaust pipe hereinafter
entioned was removed by defendant. This may have been
hen he was preparing for trial since he brought a piece
f it to court. It is not too material which layout existed
ut, obviously, there is a lesser aspect of privacy in the
ore open situation. The rear of the garage itself, which
he breadth of the platform abutted, was covered with over-
apping, horizontal, beveled (about four-inch) siding. Ap-
roximately three feet above the floor of the platform was
hat was intended to be a round hole through which an exhaust
ipe extended about three inches. In the photograph the hole
ppears to be about four inches in diameter. According
o defendant the hole was made one year previously. Con-
equently, by inference, it could have appeared as of long
tanding to the officer. The circumference of the hole was
omewhat bigger than the pipe. At one side of the hole
here was a breach in the horizontal siding about the width
f the diameter of the hole at the point where the exhaust
ipe was, tapering to a somewhat smaller width as the breach
xtended away therefrom. From the photograph the breach
ppears to be about 18 inches in length. Therefore, the

gap in the wall was fairly substantial. The rent has every appearance of having been caused by a crude and careless effort to form the hole, a fact the officer surmised in his testimony. Defendant, clearly disbelieved by the trial court, claimed that there was no such breach in the wall before the search, presenting the intimation that the officers had caused it.

Officer McKnight made the warrantless search and prepared and executed the affidavit for the subsequently issued search warrant. He had adequate expertise for all of the sworn statements he made and all of the testimony he gave. On March 13, 1969, he received a telephone call at the narcotics division from an informant, who declined to identify himself. The informant gave a description of defendant and stated that he had at his business on Lee Avenue a machine to manufacture amphetamine tablets which he was going to set up to manufacture "bennies" and that he was dealing in kilos of marijuana at his residence on Kiola Street, Arcadia. McKnight called defendant's unlisted residence telephone number, which he

had located, and a female voice advised McKnight that defendant had left for a two-week's trip to Costa Rica. McKnight maintained surveillance at the two locations during March and April. At times he saw a man answering the tendered description. He was driving a Pontiac, the registration of which checked out to defendant. It is not clear whether this was at a time when defendant was supposed to be in Costa Rica. It could have been. On July 28, 1969, McKnight received a telephone call from a person identifying himself only as the one who had called in March. McKnight recognized his voice. He stated that the pill machine was in operation ("running off 'little bennies'") in the garage just north of the office building. On that date McKnight went to the premises and "saw some activity." He interviewed the neighbor to the north who told him that he had overheard a machine running extremely loudly at the place of business. McKnight did nothing further but left, believing he might have been detected. On July 29 at about 9 p.m., with a partner or two, McKnight returned to the business premises. The gates were unlocked. He entered. He saw three trucks, one of which was moving. Employees seemed to be at work.

He talked to those in the moving truck who advised him that they were on their way to cleaning jobs. He went to th rear of the garage and there saw the exhaust pipe above the platform. No employee even tentatively interfered with or questioned his movement toward the rear of the garage, suggesting that it was not unusual for employees, tradesmen or regular or potential customers to be in that section. Many items used in the business were stored in the area. Some may have been on the platform, but they did not obstruct his view or his passage to the exhaust pipe. He went to the platform and put his eye a few inches from the hole. He peered in, presumably through the breach. His partner shone a flashlight through, and McKnight could see a pill machine and some powdery substance around it resembling amphetamine. The officers withdrew from the premises, and McKnight set down all of the information detailed in this paragraph in his affidavit for the search warrant.

BEST AVAILABLE COPY

The issue on this appeal is whether or not fendant exhibited a reasonable expectation of privacy eople v. Edwards, 71 Cal.2d 1096, 1100) as to the in- rior of the garage. The query "'whether the person has hibited a reasonable expectation of privacy . . .'" (ital: pplied) (People v. Bradley, 1 Cal.3d 80, 84) appears to nnote an objective standard or, anyway, a standard brac[illegible] a clear outward indication to others that the rson has a subjective expectation of privacy. Fourth endment protection adheres to commercial premises t open to the public. (People v. Ramsey, 272 Cal.App.2d 2, 310.) However, there may be, as in the instant tuation, a lesser aspect of intimacy than ordinarily and in residential premises. (See People v. Waltz, 14 1.App.3d 381, for pre-Edward cases[5] on difference between residence and an uninhabited outbuilding. Analogous uld be the difference between a commercial office and nonoffice outbuilding.) The business here was in a commerci- ction of the city. It was open for business in the evening e garage itself was adjacent to the converted frame office

---

5/ Some of the concepts seem applicable in the evalua- n of privacy expectations.

and served as a storage area for janitorial equipment. Some items were stored on the exterior and employees were about. It is not unlikely that employees or suppliers might go to the area of the garage with the idea of checking for equipment or supplies. (See Bradley, supra, 1 Cal.3d 80, 85; People v. Willard, 238 Cal.App.2d 292, 307.) Given the plausibility of the not infrequent presence of indivíduals in the platform area with an interest in the nature and extent of equipment and supplies, the pill machine was just about as exposed to visibility as was the partially shrub-shielded marijuana plant in Bradley, supra. The double doors of the garage apparently fitted loosely. Likely the padlock was more for the prevention of unauthorized taking of equipment and supplies than for preventing the viewing of the interior.

The breach in the wall is somewhat akin to an opening in curtains of a window. In such situations, the circumstance that the occupant has chosen to leave an opening evidences the nonexistence of a strong desire for privacy. See People v. Berutko, 71 Cal.2d 84, 91-93; People v. ing, 234 Cal.App.2d 423, 432.) Here the inference of

ndifference to exposure of an interior is even more strongl vailable. (Defendant's claim that there was no breach ndicates his recognition of this inference.) The breach ad been left continuously for many months. It could have een easily patched. From the standpoint of the officer, ong time existence unquestionably was evident to indicate efendant's attitude. From the standpoint of defendant, a par's indifference exemplified his feeling. The fact that he officer may have had to stoop and use a flashlight o look through the opening is not significant. (People v. ing, 234 Cal.App.2d 423, 432 (stooping); People v. Hobbs, 4 Cal.App.2d 402, 406 and People v. Sjosten, 262 Cal.App.2 9, 546 (flashlight).)

It is noteworthy that the hole and breach were aced in the wall by defendant, not by the police or a ird party, unknown to defendant. (See People v. King, 4 Cal.App.2d 423, 432; cf. Bielicki v. Superior Court, Cal.2d 602, 606-607; People v. Recalado, 224 Cal.App.2d 6.) The opening was indicative of a casual and careless titude on the part of defendant and the absence of a sire on his part for visual privacy as to the interior the garage. The breach in the wall, of course, was mpletely unnecessary to the use of any device in the rage as was the exhaust pipe itself.

Bielicki v. Superior Court, supra, 57 Cal.2d 602, 605-606. The officer's investigations were directed at a specific object and at a distinct activity on the part of defendant at these premises on the basis of information he had received and partially checked.

The case of People v. Verbiesen, 6 Cal.App.3d 933, (a decision out of our division, Justice Frampton pro tem., the author), although not expressly dealing with the reasonable expectation of privacy issue, affords some support for affirmance of the trial court herein. It also highlights the commendable propriety of McKnight's action of securing a search warrant. There an officer having some informant intelligence about stolen car activity at a rented private garage confirmed the information by making several observations through a crack left by the padlocked front doors. We held, in effect, that the intelligence from the informer plus the visual confirmation would have afforded probable cause for the issuance of a search warrant to obtain which there was ample time. Unfortunately the officer there did not pursue this course (as did McKnight) but resorted to

the self help of removing the padlock with the acquiescence of the landlady.

Affording greater support for our decision is People v. Maltz, supra, 14 Cal.App.3d 381 (petition for hearing by Supreme Court denied), which involved the People appeal from grant of a Penal Code section 995 motion. In that case, a Sergeant Babcock had a market parking lot under surveillance for narcotic transactions one night. He saw the defendant engaged as an apparent seller in two transactions. He saw the defendant twice go to the vicini of the yard of a nearby house, which, it developed, was not his, and presumed the defendant had his "stash" there. The defendant and a buyer were arrested for good cause. LSD tablets were taken from the buyer. After the suspects were booked later that night, Sergeant Babcock returned to investigate at the yard. A garage was situated one and one half car widths from the curbline. The door failed to meet the ground by six inches. Some garbage cans and trash were near the driveway. When Sergeant Babcock was on his hands and knees picking up and looking under papers, he shone a flashlight toward the space at the bottom of the

garage door and saw a brightly colored bag about 10 to 12 inches in. Through a hole in the bag he could see tablets similar to those found on the buyer. The Court of Appeal considered the legality of the viewing process because the observed contraband provided evidence for counts charging sale and possession. The Court of Appeal felt that there was no true search of the garage because the bag "was 'in plain sight'" of a person in the sergeant's location and position. (P. 393.) The court centered on the legality of Babcock's activity near the garbage cans. It assumed, although doubting it, that the defendant could avail himself of the owner's expectation of privacy and held that owner reasonably could not have had such an expectation and that there was ample evidence to support the preliminary hearing magistrate's determination that there was none such. It stressed that there was no impediment to the view by any street passer of the area around the cans. It further held that the sergeant's conduct in looking around the cans was not "an 'unreasonable governmental intrusion'"; that "[w]hen a policeman has information that would reasonably support the need for . . . investigation, he may . . . make minor trespasses on private property." (Pp. 395-396.)

Note that in the instant case, Officer McKnight entered premises open for business and was not deterrred by persons coming to the garage.) It further observed, in effect, that if the owner had left the contraband in the garage 'in plain sight' of anyone . . . peering through the open space from outside the garage at a distance of three feet [;] under the circumstances [he could have had] no reasonable expectation of privacy. 'What a person knowingly exposes to the public [potential business visitors], even in his . . . office, is not a subject of Fourth Amendment protection.'" (Pp. 396, 397.) Finally, the Court reiterated, "The contraband was in the plain sight of the officer who was lawfully and properly discharging his duty to investigate from a place where he had the right to be." (P. 398.)

By analogy, Officer McKnight in the instant case had a right to be at the platform area of defendant's storage garage; or at the most there was but a slight movement beyond the invitee-zone; and there was no reasonable expectation of privacy at the platform area itself. In the sense of Waltz, this was the only possible zone of

privacy with which the trial court had to be concerned -- the interior of the garage did not have to be given heed. Once the officer was at the platform, the pill machine was as much in plain sight through the approximate four-inch aperture three feet above the platform level as was the bag through the six-inch gap at the ground level.

People v. Ramsey, supra, 272 Cal.App.2d 302, cited by defendant, which involved a garage used in connection with a commercial establishment, is distinguishable in that the defendant there had left no aperture permanently open. The officer viewed the inner premises from a doorway, after pushing entirely open a door which had been left partially ajar by firemen. The reviewing court considered the situation as if the door had been locked, because defendant had so left it.

The judgment is affirmed.

CERTIFIED FOR NONPUBLICATION

REPPY, J.

I concur:

TEPHENS, J.

KAUS, P.J., Dissenting.

Without wanting to make a big thing out of it, I dissent. I would just add one fact to those recited in the majority opinion. Officer Robison, who accompanied Officer McKnight, testified that on the platform in question there were a refrigerator and what he thought a washing machine close to the rear wall where the exhaust pipe protruded. Although the pipe was visible from the rear of the platform, there is no suggestion in the record that the pill machine could have been observed from that location, even with the use of a flashlight. Robison testified that he was able to approach the wall where the pipe protruded by "kind of weeding" his way through the objects on the platform.

Taking all the circumstances into consideration, it appears to me that defendant manifested an objectively reasonable expectation of privacy.

KAUS, P.J.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-554

DENNIS L. LIEPMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Opinion Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, which was unpublished pursuant to Rule 976, California Rules of Court, is reproduced as an exhibit to the petition.

Jurisdiction

Petitioner seeks the jurisdiction of the Court under 28 U.S.C. section 1257(3).

Question Presented

Did petitioner have a reasonable expectation of privacy, which was intruded upon in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, when petitioner created a hole in the wall of a commercial building in the course of extending the exhaust pipe of a machine through it,

when the hole was considerably larger than the exhaust pipe, such that a police officer, standing on the commercial premises to the rear of the building, could see the interior of the garage and observe a machine used to manufacture amphetamine tablets?

Constitutional Provisions Involved

Petitioner invokes the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

Statement of the Case

In a court trial in the Los Angeles County Superior Court petitioner was found guilty on three counts, of possession of benzedrine for sale, possession of seconal, and possession of marijuana, in violation of California Health and Safety Code sections 11911, 11910, and 11530. The judgment was affirmed on July 15, 1971, by the California Court of Appeal, Second Appellate District, in an unpublished opinion which is attached as an exhibit to the petition. A petition for hearing in the California Supreme Court was denied on September 8, 1971.

Statement of Facts

Officer McKnight of the Los Angeles Police Department obtained a search warrant for the search of petitioner's residence in Arcadia, California, and for petitioner's business premises in South El Monte. [Rep. Tr. pp. 40-42.] Petitioner accompanied Officer McKnight during the search of the business premises, where a machine used to manufacture amphetamine tablets was found. [Rep. Tr. pp. 44-45, 49-50.] During a search of petitioner's residence pursuant to the warrant, vari-

ous jars of amphetamine, amobarbital, pentobarbital, and secobarbital, as well as marijuana and various items used in the manufacture of dangerous drugs, were found. [Rep. Tr. pp. 58-70, 73-74, 96-99.]

The issue in the present petition involves a prior warrantless search on the business premises, which provided in part the basis for the issuance of the search warrants. Testimony as to the circumstances of this search was given at a hearing in the trial court on a motion to suppress evidence pursuant to California Penal Code section 1538.5. In addition, Officer McKnight's affidavit in support of issuance of the search warrant and several photographs introduced by petitioner were admitted into evidence as exhibits at the hearing, and referred to by the Court of Appeal in its opinion.

In March of 1969 Officer McKnight received a telephone call from an unidentified informant who stated that petitioner had at his business a machine to manufacture amphetamine tablets, and that petitioner was going to set up the manufacture of "bennies." Officer McKnight verified that petitioner was the owner of the business premises mentioned by the informant, the Proclean Chemical Company in South El Monte. On July 28, 1969, the same informant again called Officer McKnight and stated that petitioner was then operating the pill machine and manufacturing "bennies." Officer McKnight verified with the owner of the business premises directly next door to petitioner's that an extremely loud machine had been operating at petitioner's business. (Affidavit in Support of Search Warrant.)

Petitioner owned and operated a janitorial cleaning service at this address. The property consisted of a single-family residence and a detached garage, both of which had been converted to business use. The former residence was used as the business office, and the detached garage and another similar structure to the rear of the location were used as storage facilities. [Rep. Tr. pp. 42-43.] Petitioner employed eight workers in the business, and supervised it himself on both days and evenings. [Rep. Tr. p 106.]

On July 29, 1969, around 9:00 p.m., Officer McKnight and his partner, Officer Robison, went to these premises. A chain link fence surrounded the property, and in the front was a second fence. The police entered the premises through the two fence gates, neither of which was locked at this time. [Rep. Tr. pp. 6-8.] A person entering the premises for commercial purposes would use these same two gates. [Rep. Tr. pp. 15-16.] Officer McKnight saw several individuals at the location. He spoke to them briefly, and they stated that they worked at the company and that they were going out to clean. [Rep. Tr. p. 16.]

Officer McKnight went to the rear of the garage and observed an exhaust pipe protruding from the rear of the building. [Rep. Tr. p. 9.] There were many items and cans stored in the area, but there was a clear and unobstructed view of the exhaust pipe. [Rep. Tr. pp. 10-11, 31.] Without moving any of these objects, the officers were able to go up to the wall where the exhaust pipe was protruding. [Rep. Tr. pp. 14, 31.]

There were no windows in this garage through which the interior could be seen, and the garage door was padlocked. [Rep. Tr. pp. 11-12.] Officer McKnight approached the exhaust pipe and observed two openings in the wall of the building, the hole through which the pipe protruded, and another torn or broken area which had been damaged. [Rep. Tr. pp. 12-14.] The pipe was about three feet from the ground and it protruded two or three inches. [Rep. Tr. p. 14.] The hole around the exhaust pipe was larger in size than the pipe itself. Upon examining the exhibits the Court of Appeal described the other hole in the following manner:

> ". . . At one side of the [exhaust pipe] hole there was a breach in the horizontal siding about the width of the diameter of the hole at the point where the exhaust pipe was, tapering to a somewhat smaller width as the breach extended away therefrom. From the photograph the breach appears to be about 18 inches in length. Therefore, the gap in the wall was fairly substantial. . . ." (Opinion, pp. 6-7 of Exhibit to the petition.)

With his face near the pipe and his partner illuminating the area with a flashlight, Officer McKnight could see the interior of the garage. [Rep. Tr. p. 14.] He could observe in the garage a machine which, in his opinion as an experienced narcotics officer, was used for making pills. [Rep. Tr. p. 17.] The police then left for the purpose of securing the search warrant.

ARGUMENT

I

The Decision Below Was Correct. Petitioner Had No Reasonable Expectation of Privacy

Petitioner contends that the police made an unreasonable intrusion upon his expectation of privacy by looking through the hole in the wall of the garage and observing the pill-making machine. (Petn. pp. 11-24.)

Respondent submits that under the circumstances of this case petitioner had no reasonable expectation of privacy, and thus the observations of the police violated none of petitioner's constitutional rights. The decision below was correct and was supported by relevant case law, and this constitutes a substantial reason for denial of certiorari.

This case should be governed by the principle stated by this Court in *Katz v. United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967):

> ". . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . ."

The petitioner must show both that he exhibited an actual expectation of privacy and that his expectation was one which society is prepared to recognize as reasonable. *Id.* at 361 (concurring opinion).

Here petitioner had no reasonable expectation of privacy. The pill machine was located in a detached garage used as a storage area for petitioner's business. According to petitioner the hole in the wall was made by him over a year before the search. [Rep. Tr. p. 20.] Petitioner gave conflicting testimony as to the ex-

tent or nature of the hole, but was obviously disbelieved by the trial court. As summarized by the Court of Appeal the evidence favorable to the prosecution showed that the circumference of the exhaust pipe hole was larger than the pipe, and that the other breach in the wall was "fairly substantial" and gave "every appearance of having been caused by a crude and careless effort to form the hole." As the Court of Appeal further noted, the long-standing duration of the hole was fairly evidenced, and this fact reflected adversely on petitioner as to his exhibition of an expectation of privacy. (Opinion, pp. 6-7, 12 of Exhibit to the petition.)

The premises appeared to be open for business at the time. The business was a janitorial service which by its very nature would have reason to operate at night. The officers approached the premises through two unlocked gates, the same way any person entering for commercial purposes would. [Rep. Tr. pp. 15-16.] The officers spoke to several employees who said they were about to go out on jobs. [Rep. Tr. p. 16.]

There were various appliances and cans on the platform to the rear of the garage. [Rep. Tr. pp. 10-11, 31.] It is quite likely that employees and suppliers, and possibly customers of the business, would be in this area. The hole in the wall was easily visible and could be reached without moving any of the stored items. [Rep. Tr. pp. 10-11, 14, 31.] Officer McKnight could see through the hole and observe the pill-making machine inside. [Rep. Tr. pp. 14, 17.]

It is evident therefore that petitioner showed neither an actual expectation nor a reasonable expectation of

privacy on the premises. Any number of persons, both employees and members of the public, could have access to the storage area and could see through the hole into the garage. Petitioner carelessly formed the hole and made no effort to patch it. In addition, apparently the pill-making machine was quite noisy and attracted the attention of neighbors (Affidavit in Support of Search Warrant).

Thus, under all the circumstances of the case, petitioner could not reasonably expect that his pill machine would be free from observation by interested persons. It will not suffice merely to argue that commercial premises are entitled to Fourth Amendment protection as well as homes. For the nature of the premises will be a substantial factor in determining the actuality and the reasonableness of the expectation of privacy there entertained. *United States v. Vilhotti*, 323 F. Supp. 425, 431-32 (S.D.N.Y. 1971). It should be noted too that, unlike the cases relied upon by petitioner concerning searches of commercial premises (Petn. p. 17), the instant case does not involve a search of an office or of drawers and documents, but merely the observation of a machine through a hole in the wall of a detached storage building.

The search here is supported by relevant federal authority. *United States v. Vilhotti, supra,* is closely in point. There an FBI agent standing in a service alley of an adjacent apartment building peered through a small space between the boards covering the window of a garage and observed stolen goods. The court held that since the gaps in the boards were readily apparent to any passerby the defendant had no reasonable expectation of privacy.

Similarly in *United States v. Hanahan*, 442 F.2d 649, 653 (7th Cir. 1971), the defendant had no reasonable expectation of privacy in a garage which, although locked, had windows through which passers-by could see inside and which the defendant made no effort to cover.

See also United States v. Crane, 445 F.2d 509, 511, 519 (5th Cir. 1971); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012, 90 S. Ct. 1241, 25 L. Ed. 2d 424 (1970); *United States v. Llanes*, 398 F.2d 880, 883-84 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032, 89 S. Ct. 647, 21 L. Ed. 2d 576 (1969).

Here the police lawfully entered the premises at a time the business was operating, through the gates a customer would use. They went to an area where employees and deliverymen might be expected. Either the police were in a place where they had a right to be, or at most they committed a minor trespass, which is not determinative of the reasonableness of the search, in light of petitioner's lack of expectation of privacy. *Harris v. United States*, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); *United States v. Hanahan, supra*, 442 F.2d 649, 654 (7th Cir. 1971); *Atwell v. United States*, 414 F.2d 136, 138 (5th Cir. 1969); *United States v. Polk*, 433 F.2d 644, 647-48 and n.1 (5th Cir. 1970).

That Officer McKnight aided his view with a flashlight is without constitutional significance. *United States v. Hanahan, supra; United States v. Vilhotti, supra*, 323 F. Supp. 425, 431-32 (S.D.N.Y. 1971).

II

This Case Turns on Unusual Facts and Is Not Sufficiently Important to Justify the Granting of Certiorari

The instant case involves an unusual fact situation and does not present a question of sufficient constitutional significance to justify the granting of a writ of certiorari by this Court. It is unlikely that many similar fact situations will arise such that this case could be useful as a guide in the future. Here an unusual type of hole in the wall is involved, not a typical window. The case concerns commercial premises where a machine for manufacturing amphetamine tablets was operating, not a private residence or office. The factual context being unusual, there is no irreconciliable conflict among the Circuits. Nor is the case squarely in conflict with any decision of this Court. This is a state court decision of a federal question which is not of sufficient general interest or importance to be reviewed by this Court.

Conclusion

Because the decision below was correct and because the case turns on unusual facts not presenting important constitutional questions, respondent respectfully requests that the petition be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1971

NO. 71-554

Supreme Court, U. S.
F I L E D
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Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

ORDER BELOW

Petitioner respectfully seeks a review of the Order of the Second District Court of Appeal affirming a judgment of the Superior Court for the County of Los Angeles, sentencing Petitioner to three years probation, the first eight months to be spent in County Jail.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is March 13, 1970 (R.C.A. Judgment).

An appeal was taken to the District Court of Appeal as prescribed under California law. That Court affirmed the Trial Court's judgment by a vote of 2 to 1, on July 15, 1971. Thereafter, a Petition for Hearing was directed to the California Supreme Court, the State's highest tribunal qualified to hear the issue in the case, and that Petition was denied on September 8, 1971.

A Petition for Certiorari was timely lodged with this Court on October 20, 1971.

On February 28, 1972, this Court denied the Petition for Certiorari.* The Petition for Rehearing is herein filed as provided in Rule 58 of the Rules of this Court.

* Mr. Justice Douglas voted to grant the Petition.

QUESTION PRESENTED FOR REVIEW

I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND ALMOST INACCESSIBLE APERTURE, VIOLATED PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATE BY THE FOURTEENTH AMENDMENT.

I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND ALMOST INACCESSIBLE APERTURE, VIOLATED PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

In Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507 (1967), this Court reversing petitioner's conviction on the basis of electronic surveillance in the absence of antecedent judicial approval, held that "the Fourth Amendment protects people, not places".

In Terry v. Ohio, 392 U.S. 1,9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), this Court, in an oft-quoted statement, held that

> "wherever an individual may harbor a reasonable 'expectation of privacy' he is entitled to be free from unreasonable governmental intrusion."

Admittedly, as this Court stated in Katz v. United States, 389 U.S. 347, 351-352, that which

> "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (Citatibns omitted). But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected."

It is unfortunate that many lower state courts have neglected to preserve the vitality of the statements in Katz and Terry. Moreover, it appears, as in Petitioner's case, that the lower courts have equated the ability and willingness of law enforcement officers to find and utilize tiny and almost inaccessible apertures into a person's domicile or business premises with a willingness on the part of that person to abandon any expectation of privacy. In addition, it is said by these courts that if law enforcement officers are able to view the interior of a person's domicile by weeding through objects on a platform which obstruct their view of a tiny and inaccessible aperture and by then employing a flashlight to view the interior of those premises, the objects seen within are in plain view. It is

Petitioner's belief that to uphold this view is to require that citizens turn their homes and business premises into fortresses to insure their own privacy. A man's home would then cease to be his "castle", but would become his dungeon.

The lower court held in the case at bar that Petitioner had exhibited no reasonable expectation of privacy for four reasons. First, employees of Petitioner might have reason to go into the area of the platform in question and, assuming they too "weeded through" the objects on the platform (as pointed out by Presiding Justice Kaus in dissent), bending down to the aperture, be able to view the interior of the garage. Second, although Petitioner had placed a padlock on the front doors of the garage, the Court felt that this was to insure the prevention of theft and not to prevent the viewing of the interior of the garage.

But as pointed out by the Court, Petitioner had hung a curtain inside, separating the rear portion (that into which the officers had looked) from the front portion. [Appendix "A", pp.4, n.3, 11.] Third, the Court reasoned that a hole in the wall was equivalent to leaving an opening in window curtains, noting that an opening indicates the non-existence of a strong desire for privacy. [Appendix "A", pp.11-12.] The majority did not believe it significant that the officers had to stoop and use a flashlight to view the interior.. [Appendix "A", p.14.] Cf. Brock v. United States, 223 F.2d 681 (5th Cir.1955) (police officers' trespass onto defendant's property and looking into a bedroom window violative of Fourth Amendment); California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (police officers' trespass

into defendant's backyard, seeing and opening paper bag placed under back porch, violative of Fourth Amendment). Fourth, and without explanation, that the police officers had a right to be on Petitioner's platform, having had to pass through two chain link fences (padlocked but not locked at the time) on Petitioner's property. [Appendix "A", p.16.] Presiding Justice Kaus, in dissent, believed that Petitioner had "manifested an objectively reasonable expectation of privacy", reasoning as follows:

> "Although the pipe was visible from the rear of the platform, there is no suggestion in the record that the pill machine could have been observed from that location, even with the use of a flashlight. Robison testified that

he was able to approach the wall where the pipe protruded by 'kind of weeding' his way through the objects on the platform." [Appendix "A", p.18.]

That Petitioner's premises are part of his business does not mean the abandonment of his Fourth Amendment rights. It has long been settled that commercial premises enjoy Fourth Amendment protection from unreasonable searches and seizures. See v. Seattle, 387 U.S. 541,543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1968); Mancusi v. DeForte, 392 U.S. 364,367, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Hoffa v. United States, 385 U.S. 293,301, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); Go-Bart Importing Co. v. United States, 282 U.S. 344,357, 51 S.Ct. 153, 75 L.Ed. 374 (1931); Gouled v. United States,

255 U.S. 298,305,309, 41 S.Ct. 261 (1921). Moreover, it is submitted that if a defendant is entitled to a reasonable expectation of privacy while telephoning from a public phone, that same protection should be afforded for those in their domiciles or business premises. For, as this Court held in Katz, that which a person

> "seeks to preserve as private even in an area accessible to the public, may be constitutionally protected." [389 U.S. 347,351-352.]

If the courts can circumvent the Katz decision by legitimizing police conduct that allows officers to place objects in "plain view" by that conduct, then citizens will have to turn their homes and businesses into fortresses in order to convince those

courts of a manifestation of a reasonable expectation of privacy. This is clearly not the intent of this Court in Katz. But, absent more stringent restrictions on the manner by which officers may assert that objects are in their plain view, it is submitted that this is the inevitable result.

Moreover, the decision of the lower court can only result in allowing law enforcement officers to employ suspect methods to place themselves in positions to view the interiors of citizens' homes and businesses in violation of the holding in Harris v. United States, 390 U.S. 234,236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). There, this Court held that

> "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

To legitimize a police officer's weeding through objects to find a minute and inaccessible aperture through which, by the use of a flashlight, he may view the interior of Petitioner's premises nullifies the decision in Harris. Cf. Brock v. United States, 223 F.2d 681,685 (5th Cir. 1955), where the court held as follows:

> "To begin with, the agents, when they appeared outside Brock's bedroom window, were in violation of his rights under the Fourth Amendment. Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that 'standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

Accord, People v. Regalado, 193 Cal.App.2d

437 (1961), remanded in light of Ker v. California and McDonald v. United States, 374 U.S. 497, 83 S.Ct. 1875, 10 L.Ed.2d 1044 (1963), and reversed 224 Cal.App.2d 586 (1964) (officer illegally looked through tiny aperture drilled in door of hotel room). People v. Edwards, 71 Cal.2d 1096 (1969); Britt v. Superior Court, 58 Cal.2d 469, 471-472 (1962).

Finally, to uphold the decision of the lower court may mean that courts will continue to equate "plain view" not with what one has in fact knowingly exposed to public view but rather with what law enforcement officers have been able to ferret out and expose to their own view by subtle but no less serious invasions of the privacy of the individual, his domicile and his business. As this Court noted in Johnson v. United

States, 333 U.S. 10,14, 68 S.Ct. 367 (1948):

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."

Should the decision of the lower court not be reviewed, but allowed to stand, we have perhaps not heeded the warning of this Court in Gouled v. United States, 255 U.S. 298,302-303, 41 S.Ct. 261, 65 L.Ed. 647 (1921):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court

(Citations omitted) have declared the importance to political liberty and to the welfare of our country of the due observation of the rights guaranteed under the Constitution by [the Fourth and Fifth] Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen ...It has been repeatedly decided that these amendments should

receive liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

This argument was presented in our original Petition for Certiorari and the Court was divided as to whether to grant a hearing. Petitioner again urges that a pronouncement from this Court concerning the nature of the expectations a domiciliary may entertain regarding his privacy is compelled in view of the frequency of police invasions similar to those occurring in this case. Cf. People v. Regelado, 193 Cal.App.2d 437 (1961), vacated 374 U.S. 497, 83 S.Ct. 1875, 224 Cal.App.2d 586 (1964).

CONCLUSION

For the aforegoing reasons, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,

LUKE McKISSACK
Attorney for Petitioner

AFFIDAVIT

I, LUKE McKISSACK, counsel for Petitioner, certify that this Petition for Rehearing is based upon meritorious grounds not heretofore fully considered by the Court and is not interposed for purposes of delay.

Luke McKissack

LUKE McKISSACK
Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

On MARCH 22, 1972, before me, the undersigned, a Notary Public in and for said State, personally appeared LUKE McKISSACK known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Louise A. Monaco
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Jan. 11, 1976

Louise A. Monaco

Notary Public in and for said State

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California, 90028. On March 22, 1972, I served the within PETITION FOR REHEARING on the Plaintiff and Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General, State of California
217 West First Street
Los Angeles, California 90012

District Attorney, Los Angeles County
Hall of Justice, Room 600
211 West Temple Street
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Los Angeles Superior Court
Clerk's Office, Criminal Records
Hall of Justice, Room 448
211 West Temple Street
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 22, 1972, at Los Angeles, California.

H. Mallon Ley